

## **18 U.S.C. § 3607: Federal First Offender Act**

In *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, 735 (9th Cir. 2000), the Ninth Circuit held that state rehabilitative relief from first-offense simple possession convictions was effective to eliminate immigration consequences if the petitioner would have qualified for treatment under the Federal First Offender Act (FFOA), 18 U.S.C. § 3607. However, on July 14, 2011, the Ninth Circuit prospectively overruled *Lujan-Armendariz*, holding that “rehabilitative relief” would no longer eliminate a first conviction for a simple possession drug offense. *Nunez-Reyes v. Holder*, 646 F.3d 684, 687 (9th Cir. 2011) (en banc). Therefore, any state controlled substance convictions after July 14, 2011, are considered in immigration court. This means that a state conviction after that date that has been expunged remains a conviction for immigration purposes. Controlled substance convictions on or before July 14, 2011, will still be treated under the prior law (*Lujan-Armendariz*) and can receive the benefit of state rehabilitative laws.

The following requirements must be met before state rehabilitative relief will eliminate the immigration consequences of first convictions of qualifying controlled substances offenses:

1. The conviction must have occurred on or before July 14, 2011. INA § 101(a)(48)(A).
2. The conviction must be for a first controlled substance offense. See 18 U.S.C. § 3607(a) (no FFOA rehabilitative relief if there was a prior state or federal controlled substances conviction or grant of first offender treatment – even if the prior first offender treatment did not result in a conviction); *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 (9th Cir. 2007). A prior conviction or first offender disposition (even if under a pre-plea program) will disqualify respondent, though this may not be the case if the earlier disposition was a for an offense committed when the respondent was younger than 21 years old.
3. The conviction must be for simple possession of any controlled substance, or possession of drug paraphernalia, or, arguably, any other controlled substances conviction that is (a) less serious than simple possession, and (b) not penalized under federal controlled substances legislation.<sup>1</sup>
4. The rehabilitative relief for a qualifying conviction may be granted after July 14, 2011; it is the conviction itself that must occur on or before that date for this relief to be effective after *Nunez-Reyes*.
5. Respondent must not have violated probation for this relief to be effective. *Estrada v. Holder*, 560 F.3d 1039, 1041 (9th Cir. 2009), overruled on other grounds by *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).
6. While there is no age limit to participate in the diversion program under 3607(a), an offender must be younger than 21 years old at the time of the offense to subsequently have the arrest record expunged under 3607(c). Thus, when analyzing arrests to establish good moral character (rather than the “conviction” to establish removability), note that a respondent would only have been eligible to have the arrest expunged under the FFOA if she or he were younger than 21 years. See *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 812 n.9 (9th Cir. 2009) (noting the distinction between subdivisions (a) and (c) of section 3607), overruled by *Nunez-Reyes*, 646 F.3d 684.
7. Several circuits have held that relief under the FFOA is not available to an individual sentenced to a term of probation that exceeds one year or includes any jail time. See *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 333–34 (5th Cir. 2004); *Elkins v. Comfort*, 392 F.3d 1159, 1163 (10th Cir. 2004); *Vasquez-Velezmoreo v. INS*, 281 F.3d 693, 697–98 (8th Cir. 2002); *Fernandez-Bernal v. U.S. Att'y Gen*, 257 F.3d 1304, 1316 (11th Cir. 2001). However, the Ninth Circuit has not ruled on this issue. See *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 812 (9th Cir. 2009) (noting that “because the BIA has not yet considered this issue, we do not decide it here”), overruled by *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc); see also *Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1289 n.5 (9th Cir. 2004). Although the Board has agreed that an individual sentenced to a term of probation longer than one year or any jail time would be ineligible for FFOA, the Board declined to consider whether to adopt that ruling outside the Eleventh Circuit. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 232 (BIA 2002). This issue is thus unresolved in the Ninth Circuit.

<sup>1</sup> Being under the influence is not a lesser crime than simple possession. *Nunez-Reyes*, 646 F.3d at 695.

### Qualifying Offenses

Drug convictions constitute “an offense” under the FFOA where the counts arise out of a single event, comprise a single criminal case, and result in a single, undivided sentence. *Villavicencio-Rojas v. Lynch*, 811 F.3d 1216 (9th Cir. 2016).

Two offenses clearly qualify for this type of relief under current law:

1. Simple possession of any controlled substance.
2. Possession of drug paraphernalia. *E.g.*, Cal. Health & Safety Code § 11364. *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1137 (9th Cir. 2000) (possession of drug paraphernalia qualifies for FFOA treatment), *overruled by Nunez-Reyes*, 646 F.3d 684.

**One other minor controlled substances offense clearly no longer qualifies for this type of relief under current law:** Being under the influence of a controlled substance. *E.g.*, Cal. Health & Safety Code § 11550(a).) *Nunez-Reyes*, 646 F.3d at 695.

## **Cal Penal Code §§ 1000 – 1000.4: Deferred Entry of Judgment**

This statutory scheme allows defendants to enter a plea, complete rehabilitative requirements, and then have the charges dismissed following successful completion of the imposed requirements. A brief summary of each section is provided below:

1000: Laying out the requirements to participate in the DEJ program.

1000.1: Specifying that the prosecutor shall inform the defendant of the DEJ program if he or she is eligible to participate.

1000.2: Specifying that the court shall hold hearings to determine eligibility to participate in this DEJ scheme.

1000.3: After successful completion of the rehabilitative requirements, the charges are dismissed.

1000.4: Providing for limited record expungement upon successful completion of the program.

**Effect on INA “conviction”: NONE, as long as conviction occurred after July 14, 2011<sup>2</sup>**

### **Pre-January 1, 1997:**

Prior to January 1, 1997, this program was *pre-plea*, so there would be no INA “conviction” regardless of the FFOA as the INA requires some finding of guilt. *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 & n.3 (9th Cir. 2007).

### **January 1, 1997 - July 14, 2011:**

*Lujan-Armendariz*, 222 F.3d 728, 749 (9th Cir. 2000): Expungement under a state law analogous to the FFOA eliminates immigration consequences that would otherwise stem from that conviction (assuming that respondent was otherwise eligible for FFOA treatment at the time of conviction).

### **Post-July 14, 2011:**

*Nunez-Reyes v. Holder*, 646 F.3d 684, 693 (9th Cir. 2011) (en banc): **Prospectively** overruled *Lujan-Armendariz*. Successful completion of a state DEJ program does not obviate the immigration consequences of an INA “conviction,” even if the respondent would have been eligible for FFOA treatment.

**Effect on discretionary good moral character determinations: NONE, if conviction occurred after July 14, 2011**

### **Pre-July 14, 2011:**

*Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994): BIA **MAY** consider arrests expunged under this DEJ statute in analyzing discretionary 212(c) relief, at least where the petitioner would have been ineligible for FFOA record expungement under 18 U.S.C. § 3607(c) had he or she been tried in federal court (such as if he or she were older than 21 years at the time of the offense). \*It should not make a difference that this scheme was pre-plea at the time of decision.

*Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009): BIA may **NOT** consider arrests expunged under a DEJ statute in analyzing good moral character, *at least statutorily*, if the petitioner would have been eligible for FFOA treatment. Although this case dealt with a statutory bar to establish good moral character, its language and reasoning is broad and

<sup>2</sup> Note that even where there may be no “conviction” under the INA, the respondent may still be removable on grounds that do not require a conviction, such as aliens for whom there is reason to believe have been engaged in illicit trafficking in a controlled substance. See *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (holding that a petitioner was removable as an alien for whom there was “reason to believe” engaged in illicit trafficking where his conviction was overturned on appeal for reasons unrelated to the voluntariness of his plea); *Sneddon v. INS*, 107 F.3d 17 (9th Cir. 1997) (unpublished) (holding that a petitioner was removable as an alien for whom there was reason to believe engaged in illicit trafficking, despite his expunged conviction, because that removability ground does not require a conviction).

could be interpreted to apply to discretionary factors, though it is likely distinguishable as merely applying to a statutory bar to discretionary relief.

**Post-July 14, 2011:**

*Nunez-Reyes v. Holder*, 646 F.3d 684, 693 (9th Cir. 2011) (en banc): **Prospectively** overruled *Romero v. Holder*. Thus, the BIA may likely now consider conduct/arrests underlying the DEJ program even if the respondent would have been eligible for FFOA expungement, both for statutory bars to relief and discretionary factors. This is because “expunged convictions can be used in assessing an alien’s good moral character because the facts underlying expunged convictions are relevant in the context of good moral character determinations.” *Matter of Frankie Contreras*, A 094 148 422, 2004 WL 3187225, \*2 (BIA Dec. 28, 2004) (unpublished) (citing *United States v. Hovsepian*, 359 F.3d 1144, 1158 (9th Cir. 2004), and *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002)).

## **Cal Penal Code § 1000.5: Pre-Plea Drug Court Program**

(a) The presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender, may agree in writing to establish and conduct a preguilty plea drug court program pursuant to the provisions of this chapter, wherein criminal proceedings are suspended without a plea of guilty for designated defendants. The drug court program shall include a regimen of graduated sanctions and rewards, individual and group therapy, urine analysis testing commensurate with treatment needs, close court monitoring and supervision of progress, educational or vocational counseling as appropriate, and other requirements as agreed to by the presiding judge or his or her designee, the district attorney, and the public defender. If there is no agreement in writing for a preguilty plea program by the presiding judge or his or her designee, the district attorney, and the public defender, the program shall be operated as a deferred entry of judgment program as provided in this chapter.

(b) The provisions of Section 1000.3 and Section 1000.4 regarding satisfactory and unsatisfactory performance in a program shall apply to preguilty plea programs. If the court finds that (1) the defendant is not performing satisfactorily in the assigned program, (2) the defendant is not benefiting from education, treatment, or rehabilitation, (3) the defendant has been convicted of a crime specified in Section 1000.3, or (4) the defendant has engaged in criminal conduct rendering him or her unsuitable for the preguilty plea program, the court shall reinstate the criminal charge or charges. If the defendant has performed satisfactorily during the period of the preguilty plea program, at the end of that period, the criminal charge or charges shall be dismissed and the provisions of Section 1000.4 shall apply.

### Effect on INA definition of “conviction” for removability/inadmissibility: NO INA “CONVICTION”<sup>3</sup>

This statute authorizes superior courts to establish pre-plea drug court programs. Because any dismissal following completion of such a program would not involve a plea or finding of guilt, the INA definition of “conviction” would not be satisfied. *See, e.g., de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 & n.3 (9th Cir. 2007).

### Effect on discretionary good moral character determinations: NONE, if conviction occurred after July 14, 2011

#### **Pre-July 14, 2011:**

*Paredes-Urrestarazu v. INS*, 36 F.3d 801 (9th Cir. 1994): The version of the California DEJ statute at issue in *Paredes-Urrestarazu* was a pre-plea scheme, which the California legislature changed to a post-plea scheme on January 1, 1997. The Ninth Circuit held that the BIA **MAY** consider arrests expunged under the plea-plea statute in analyzing discretionary 212(c) relief, at least where the petitioner would have been ineligible for FFOA record expungement under 18 U.S.C. § 3607(c) had he or she been tried in federal court (such as if he or she were older than 21 years at the time of the offense).

*Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009): BIA may **NOT** consider arrests expunged under a DEJ statute in analyzing good moral character, *at least statutorily*, if the petitioner would have been eligible for FFOA treatment. Although *Romero* dealt with a post-plea scheme, the reasoning hinges on whether the petitioner would or would not have been eligible for FFOA relief. Although this case also dealt with a statutory bar to establish good moral character, its language and reasoning is broad and could be interpreted to apply to discretionary factors, though it is likely distinguishable as merely applying to a statutory bar to discretionary relief.

#### **Post-July 14, 2011:**

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<sup>3</sup> Note that even where there may be no “conviction” under the INA, the respondent may still be removable on grounds that do not require a conviction, such as aliens for whom there is reason to believe have been engaged in illicit trafficking in a controlled substance. *See Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (holding that a petitioner was removable as an alien for whom there was “reason to believe” engaged in illicit trafficking where his conviction was overturned on appeal for reasons unrelated to the voluntariness of his plea); *Sneddon v. INS*, 107 F.3d 17 (9th Cir. 1997) (unpublished) (holding that a petitioner was removable as an alien for whom there was reason to believe engaged in illicit trafficking, despite his expunged conviction, because that removability ground does not require a conviction).

*Nunez-Reyes v. Holder*, 646 F.3d 684, 693 (9th Cir. 2011) (en banc): **Prospectively** overruled *Romero v. Holder*. Thus, the BIA may consider conduct/arrests underlying the DEJ program even if the respondent would have been eligible for FFOA expungement, both for statutory bars to relief and discretionary factors.

## **Cal Penal Code § 1016.5: Plea Withdrawal Due to Failure to Advise of Immigration Consequences**

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

(c) With respect to pleas accepted prior to January 1, 1978, it is not the intent of the Legislature that a court's failure to provide the advisement required by subdivision (a) of Section 1016.5 should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

(d) The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. It is also the intent of the Legislature that the court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction. It is further the intent of the Legislature that at the time of the plea no defendant shall be required to disclose his or her legal status to the court.

### Effect on INA “conviction”: NO INA “CONVICTION”<sup>4</sup>

A plea withdrawn under this statute does not fit the INA definition of a “conviction” as the vacatur was “because of a procedural defect.” *Matter of Sergio Gabriel Raya-Dominguez*, A 043 488 730, 2015 WL 7074243, \*1 (BIA Oct. 22, 2015) (unpublished).

### Effect on discretionary good moral character determinations: (b) (5)

<sup>4</sup> Note that even where there may be no “conviction” under the INA, the respondent may still be removable on grounds that do not require a conviction, such as aliens for whom there is reason to believe have been engaged in illicit trafficking in a controlled substance. See *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (holding that a petitioner was removable as an alien for whom there was “reason to believe” engaged in illicit trafficking where his conviction was overturned on appeal for reasons unrelated to the voluntariness of his plea); *Sneddon v. INS*, 107 F.3d 17 (9th Cir. 1997) (unpublished) (holding that a petitioner was removable as an alien for whom there was reason to believe engaged in illicit trafficking, despite his expunged conviction, because that removability ground does not require a conviction).

(b) (5) (b) (5)



### **Cal Penal Code § 1203.4(a): Plea Withdrawal Following Successful Completion of Probation**

(a)(1) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. The probationer shall be informed, in his or her probation papers, of this right and privilege and his or her right, if any, to petition for a certificate of rehabilitation and pardon. The probationer may make the application and change of plea in person or by attorney, or by the probation officer authorized in writing. However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.

(2) Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.

(3) Dismissal of an accusation or information underlying a conviction pursuant to this section does not permit a person prohibited from holding public office as a result of that conviction to hold public office.

(4) This subdivision shall apply to all applications for relief under this section which are filed on or after November 23, 1970.

#### Effect on INA “conviction”: **NONE**

Although “some expungement statutes could eliminate completely the immigration consequences of a state conviction, California Penal Code section 1203.4 is not such a statute.” *Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002). In *Ramirez-Castro*, a petitioner’s conviction was expunged pursuant to section 1203.4 of the CPC. *Id.* at 1173. The Ninth Circuit held that his conviction nonetheless rendered him deportable, reasoning that section 1203.4 does not eliminate all consequences of conviction even under California law, as it “does not affect any revocation or suspension of the privilege of the person convicted to drive a motor vehicle.” *Id.* at 1175-76 (citing section 13555 of the California Vehicle Code). Because section 1203.4 of the CPC provides only limited expungement even under state law, the Ninth Circuit held that it was reasonable to conclude that a conviction expunged under that provision remains a conviction for purposes of federal law. *Id.*

#### Effect on discretionary good moral character determinations (b) (5)



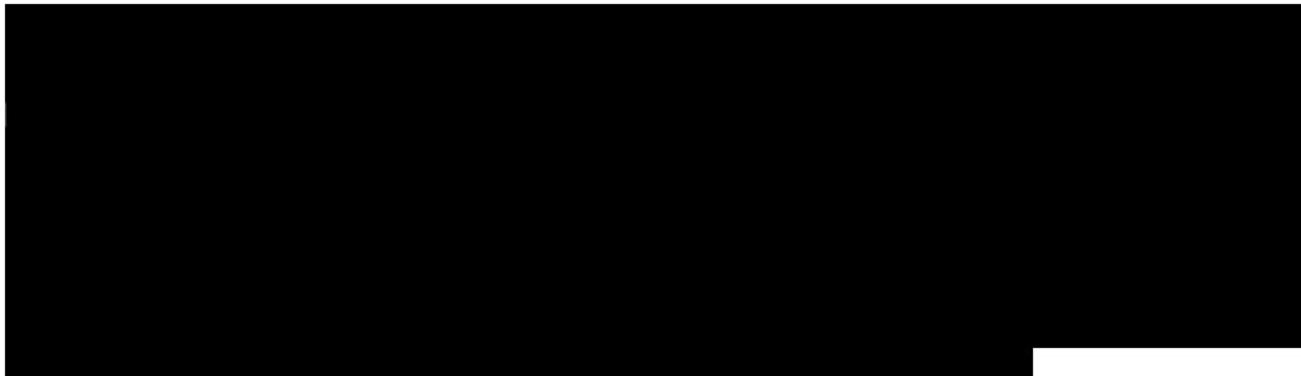
### **Cal Penal Code § 1203.43: Plea Withdrawal Due to Invalid Plea**

(a)(1) The Legislature finds and declares that the statement in Section 1000.4, that “successful completion of a deferred entry of judgment program shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate” constitutes misinformation about the actual consequences of making a plea in the case of some defendants, including all noncitizen defendants, because the disposition of the case may cause adverse consequences, including adverse immigration consequences.

(2) Accordingly, the Legislature finds and declares that based on this misinformation and the potential harm, the defendant's prior plea is invalid.

(b) For the above-specified reason, in any case in which a defendant was granted deferred entry of judgment on or after January 1, 1997, has performed satisfactorily during the period in which deferred entry of judgment was granted, and for whom the criminal charge or charges were dismissed pursuant to Section 1000.3, the court shall, upon request of the defendant, permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty, and the court shall dismiss the complaint or information against the defendant. If court records showing the case resolution are no longer available, the defendant's declaration, under penalty of perjury, that the charges were dismissed after he or she completed the requirements for deferred entry of judgment, shall be presumed to be true if the defendant has submitted a copy of his or her state summary criminal history information maintained by the Department of Justice that either shows that the defendant successfully completed the deferred entry of judgment program or that the record is incomplete in that it does not show a final disposition. For purposes of this section, a final disposition means that the state summary criminal history information shows either a dismissal after completion of the program or a sentence after termination of the program.

Effect on INA “conviction”: (b) (5)



<sup>5</sup> Note that even where there may be no “conviction” under the INA, the respondent may still be removable on grounds that do not require a conviction, such as aliens for whom there is reason to believe have been engaged in illicit trafficking in a controlled substance. *See Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (holding that a petitioner was removable as an alien for whom there was “reason to believe” engaged in illicit trafficking where his conviction was overturned on appeal for reasons unrelated to the voluntariness of his plea); *Sneddon v. INS*, 107 F.3d 17 (9th Cir. 1997) (unpublished) (holding that a petitioner was removable as an alien for whom there was reason to believe engaged in illicit trafficking, despite his expunged conviction, because that removability ground does not require a conviction).

(b) (5)



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### **Cal Penal Code § 1203.45: Sealing Records of Juvenile Offenders**

(a) In a case in which a person was under 18 years of age at the time of commission of a misdemeanor and is eligible for, or has previously received, the relief provided by Section 1203.4 or 1203.4a, that person, in a proceeding under Section 1203.4 or 1203.4a, or a separate proceeding, may petition the court for an order sealing the record of conviction and other official records in the case, including records of arrests resulting in the criminal proceeding and records relating to other offenses charged in the accusatory pleading, whether the defendant was acquitted or charges were dismissed. If the court finds that the person was under 18 years of age at the time of the commission of the misdemeanor, and is eligible for relief under Section 1203.4 or 1203.4a or has previously received that relief, it may issue its order granting the relief prayed for. Thereafter the conviction, arrest, or other proceeding shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence.

#### Effect on INA definition of “conviction” for removability/inadmissibility: NO INA “CONVICTION”<sup>6</sup>

An act committed by a minor and handled in juvenile delinquency proceedings does not qualify as a “conviction” under the INA because of relation to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042. *Matter of Davison-Charles*, 22 I&N Dec. 1362 (BIA 2001). The same rule applies to the former Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. *Matter of Zingis*, 14 I&N Dec. 621 (BIA 1974). Following that reasoning, the Board held that CPC § 1203.45 “operates to eliminate the conviction as a basis for deportability.” *Matter of Lima*, 15 I&N Dec. 661, 665 (BIA 1976). Note that where a state elects to try a minor as an adult, there is a “conviction” under the INA. *Vargas-Hernandez v. Gonzales*, 497 F.3d 919 (9th Cir. 2007). Interestingly, all youthful offenders who receive relief under section 1203.45 were treated as adults resulting in a misdemeanor, but the Board stated in *Lima* that the individuals are nonetheless subsequently treated as youthful offenders when granted relief under section 1203.45. 15 I&N Dec. at 664. Thus, there is no INA “conviction.” *Id.*

#### Effect on discretionary good moral character determinations: NONE

Although an act committed when a juvenile does not meet the definition of a “conviction” under the INA, the BIA may still consider the act for discretionary relief purposes. See *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2004) (holding that even if a conviction is set aside under the former Federal Youth Corrections Act, the facts underlying that conviction are still relevant in determining good moral character); see also *Castro-Saravia v. Ashcroft*, 122 Fed. App’x 303 (9th Cir. 2004) (unpublished); *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006) (per curiam).

<sup>6</sup> Note that this does not apply to bases of removability that do not require a “conviction,” such as individuals the Government has reason to believe have engaged in illicit trafficking. *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979) (holding that individuals convicted under the Federal Youth Corrections Act remain removable where there is reason to believe they have engaged in illicit trafficking because that removability ground does not require a conviction).

### **Cal Penal Code § 1210.1: Set Aside Controlled Substances Conviction Following Probation**

This statutory scheme allows defendants to complete probation following a controlled substances conviction. Thereafter, the conviction is set aside, the indictment dismissed, and the arrest and conviction are deemed never to have occurred.

- (a) Specifying that any person convicted of a nonviolent drug possession offense shall receive probation, including participation in a drug treatment program.
- (b) Limiting availability of this program depending on prior convictions.
- (c) Limiting availability of this program depending on prior convictions.
- (d) Instructions for the probation department.
- (e) Providing that after completion of terms of probation and drug treatment, the court shall “the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred . . . . Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.”
- (2) Despite dismissal of the complaint, the defendant may nonetheless not own or possess any firearm.
- (3) Providing that except with regard to applications for certain public employment positions, a defendant may indicate on questionnaires that he or she was never arrested, and “successfully completion of a drug treatment program under this section may not, without the defendant’s consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.”
- (f) If probation is revoked, the defendant may be incarcerated.
- (g) Defining “drug-related condition of employment.”

Effect on INA “conviction”: **NONE, as long as conviction occurred after July 14, 2011**<sup>78</sup>

#### **Pre - July 14, 2011:**

*Lujan-Armendariz*, 222 F.3d 728, 749 (9th Cir. 2000): Expungement under a state law analogous to the FFOA eliminates immigration consequences that would otherwise stem from that conviction (assuming that respondent was otherwise eligible for FFOA treatment at the time of conviction). In an unpublished decision, the BIA held that expungement under section 1210.1 was analogous to the FFOA. *Matter of Antonio Francisco Mandigma*, A 043 022 132, 2008 WL 1734632 (BIA 2008).

#### **Post-July 14, 2011:**

*Nunez-Reyes v. Holder*, 646 F.3d 684, 693 (9th Cir. 2011) (en banc): **Prospectively** overruled *Lujan-Armendariz*. Successful completion of section 1210.1 does not obviate the immigration consequences of an INA “conviction,” even if the respondent would have been eligible for FFOA treatment.

<sup>7</sup> Note that even where there may be no “conviction” under the INA, the respondent may still be removable on grounds that do not require a conviction, such as aliens for whom there is reason to believe have been engaged in illicit trafficking in a controlled substance. See *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (holding that a petitioner was removable as an alien for whom there was “reason to believe” engaged in illicit trafficking where his conviction was overturned on appeal for reasons unrelated to the voluntariness of his plea); *Sneddon v. INS*, 107 F.3d 17 (9th Cir. 1997) (unpublished) (holding that a petitioner was removable as an alien for whom there was reason to believe engaged in illicit trafficking, despite his expunged conviction, because that removability ground does not require a conviction).

<sup>8</sup> Note also that the language in this statute is very similar to the language in section 1000.4 that the State sought to cure by passing section 1203.43. A respondent might therefore argue that section 1203.43 relief should apply to convictions expunged under section 1210.1.

*Reyes v. Lynch*, 834 F.3d 1104 (9th Cir. 2016): Despite expungement under section 1210.1, a petitioner stands convicted under the INA where a term of probation with specific requirements was imposed. The court distinguished *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010), on the ground that the sentence consisting solely of a small, suspended fine did not constitute a restraint on liberty sufficient to constitute a conviction under the INA, whereas a term of probation with specific requirements does (including a fine that was *not* suspended).

Effect on discretionary good moral character determinations: (b) (5)



### **Cal Penal Code § 1385(a): Dismissal Upon Motion or *Sua Sponte***

(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading.

#### Effect on INA definition of “conviction” for removability/inadmissibility: IT DEPENDS<sup>9</sup>

This statute gives the state judge or magistrate broad authority to dismiss an action. Thus, whether the statute does or does not render a respondent removable or inadmissible depends upon the reason given on the record, i.e., whether the reason is for a procedural defect or mere rehabilitate/hardship reasons. If the only reason given on the record is “in the interest of justice,” the government has not met its burden to show the conviction was vacated for equitable or humanitarian reasons alone. *Marmolejo v. Gonzales*, 173 Fed. App’x 573, 575 (9th Cir. 2006) (unpublished). However, note that in other contexts the burden is on the respondent to demonstrate that an expunged conviction does not carry immigration consequences. See *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (analyzing a motion to reopen and stating that “in order to prevail on his argument that the expungement of his conviction nullified it for purposes of the INA, Petitioner must demonstrate that his case falls within the exception”).

#### Effect on discretionary good moral character determinations: (b) (5)



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<sup>9</sup> Note that even where there may be no “conviction” under the INA, the respondent may still be removable on grounds that do not require a conviction, such as aliens for whom there is reason to believe have been engaged in illicit trafficking in a controlled substance. See *Chavez-Reyes v. Holder*, 741 F.3d 1 (9th Cir. 2014) (holding that a petitioner was removable as an alien for whom there was “reason to believe” engaged in illicit trafficking where his conviction was overturned on appeal for reasons unrelated to the voluntariness of his plea); *Sneddon v. INS*, 107 F.3d 17 (9th Cir. 1997) (unpublished) (holding that a petitioner was removable as an alien for whom there was reason to believe engaged in illicit trafficking, despite his expunged conviction, because that removability ground does not require a conviction).

**Cal Welfare & Institutions Code § 1772(a): Youth Authority Board; Set Aside Verdict**

(a) Subject to subdivision (b), every person honorably discharged from control by the Youth Authority Board who has not, during the period of control by the authority, been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, and every person discharged may petition the court which committed him or her, and the court may upon that petition set aside the verdict of guilty and dismiss the accusation or information against the petitioner who shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, including, but not limited to, any disqualification for any employment or occupational license, or both, created by any other provision of law.

**Effect on INA definition of “conviction” for removability/inadmissibility: NO INA “CONVICTION”<sup>10</sup>**

An act committed when a minor and handled in juvenile delinquency proceedings does not qualify as a “conviction” under the INA because of relation to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042. *Matter of Davison-Charles*, 22 I&N Dec. 1362 (BIA 2001).<sup>11</sup> The same rule applied to the former Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq. *Matter of Zingis*, 14 I&N Dec. 621 (BIA 1974). Under this reasoning, the Board held that a conviction set aside under Cal. Welf. & Inst. Code § 1772 does not qualify as a conviction where the respondent would be eligible for treatment under the Federal Youth Corrections Act. *Matter of Andrade*, 14 I&N Dec. 651 (BIA 1974). This holding vacated a prior Board decision that section 1772 had no effect on removability. See *Matter of Andrade*, 14 I&N Dec. 364 (BIA 1973), vacated by *Andrade*, 14 I&N Dec. 651. Note that this rule also contrasts with prior circuit precedent holding that section 1772 did not obviate the immigration consequences of a conviction. See *de la Cruz-Martinez v. INS*, 404 F.2d 1198 (9th Cir. 1968); *Garcia-Gonzales v. INS*, 344 F.2d 804 (9th Cir. 1965); see also *Adams v. United States*, 299 F.2d 327 (9th Cir. 1962).

**Effect on discretionary good moral character determinations: NONE**

Although an act committed when a juvenile does not meet the definition of a “conviction” under the INA, the BIA may still consider the act for discretionary relief purposes. See *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir. 2004) (holding that even if a conviction is set aside under the former Federal Youth Corrections Act, the facts underlying that conviction are still relevant in determining good moral character); see also *Castro-Saravia v. Ashcroft*, 122 Fed. App’x 303 (9th Cir. 2004) (unpublished); *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006) (per curiam).

<sup>10</sup> Note that this does not apply to bases of removability that do not require a “conviction,” such as individuals the Government has reason to believe have engaged in illicit trafficking. See *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979) (holding that individuals convicted under the Federal Youth Corrections Act remain removable where there is reason to believe they have engaged in illicit trafficking because that removability ground does not require a conviction).

<sup>11</sup> Note also that where a state elects to try a minor as an adult, there is a “conviction” under the INA. *Vargas-Hernandez v. Gonzales*, 497 F.3d 919 (9th Cir. 2007).

**Cal Health Safety Code § 11361.8: Recall or dismissal of sentence**

- (a) A person currently serving a sentence for a conviction, whether by trial or by open negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those sections have been amended or added by that act
- (b) Upon receiving a petition under subdivision (a), the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.

Effect on INA “conviction”: (b) (5)



Effect on discretionary good moral character determinations: NONE

**Cal Penal Code § 18.5 : County jail confinement up to or not to exceed 364 days; retroactive application; sentence modification**

- (a) Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days. This section shall apply retroactively, whether or not the case was final as of January 1, 2015.
- (b) A person who was sentenced to a term of one year in county jail prior to January 1, 2015, may submit an application before the trial court that entered the judgment of conviction in the case to have the term of the sentence modified to the maximum term specified in subdivision (a).

Effect on INA “conviction”: (b) (5)



Effect on discretionary good moral character determinations: **NONE**